IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

DATE OF DECISION: 12 .10.2006

1. Amended C.W.P.NO 6099 of 2005

Mohinder Singh ...Petitioner

Versus

State of Haryana and another ...Respondents.

2. CWP No.5437 of 2005

Jitender Kumar and others ...Petitioners

Versus

The State of Haryana and another ...Respondents.

3. Amended CWP No.2839 of 2005

Deepak Dahiya and others ...Petitioners

Versus

The State of Haryana and others ...Respondents.

4. CWP No.14371 of 2005

Lokesh Kumar and others ...Petitioners

Versus

The State of Haryana and another ...Respondents.

5. CWP No.6258 of 2005

Neeraj Kumar ...Petitioners

Versus

The State of Haryana and others ...Respondents.

6. CWP No.7683 of 2005

Ramesh Kumar **...Petitioner**

Versus

The State of Haryana and another **...Respondents.**

7. **CWP No.14317 of 2005**

Suman Lata **...Petitioner**

Versus

The State of Haryana and another **...Respondents.**

8. **CWP No.4818 of 2005**

Vandana Goel **...Petitioners**

Versus

The State of Haryana and another **...Respondents.**

9. **CWP No.14370 of 2005**

Priyanka **...Petitioners**

Versus

The State of Haryana and others **...Respondents.**

10. **CWP No.16951 of 2005**

Neha Bansal **...Petitioner**

Versus

State of Haryana and others **...Respondents.**

11. **CWP No.18572 of 2005**

Sandeep Aggarwal and others **...Petitioners**

Versus

The State of Haryana and another **...Respondents.**

12. **CWP No.4457 of 2005**

Devinder Singh **...Petitioners**

Versus

The State of Haryana and others ...Respondents.

13. CWP No.12540 of 2005

Rajiv Parshad and another ...Petitioners

Versus

The State of Haryana and others ...Respondents.

14. Amended CWP No.3768 of 2005

Subhash Chander and others ...Petitioners

Versus

The State of Haryana and others ...Respondents.

15 Amended CWP No.2897 of 2005

Chandi Ram and others ...Petitioners

Versus

The State of Haryana and others ...Respondents.

CORAM: HON'BLE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE S.S.SARON

PRESENT: Mr.Jaspal Singh, Sr.Advocate with
Mr.J.S.Duhan, Advocate
Mr.G.K.Chatrath, Sr.Advocate with
Ms. Alka Chatrath, Advocate
Mr.Rajiv Atma Ram, Sr.Advocate with
Mr.Hemraj Mittal, Advocate
Mr.P.S.Patwalia,Sr.Advocate with
Mr.D.S.Patwalia, Advocate
Mr.R.K.Malik, Advocate and
Mr.Vivek Sharma, Advocate
Mr.Jagbir Malik, Advocate
Mr.Y.P.Malik, Advocate
Mr.Vivek Suri, Advocate

Mr.Sandeep Kotla,Advocate
Mr.G.P.Singh,Advocate
Mr C.B.Goel, Advocate
Mr.G.S.Bajwa,Advocate
Mr.G.P.Singh,Advocate
Mr.Hari Om Attri, Advocate
for the petitioners.

Mr.H.S.Hooda, Advocate General, Haryana with
Mr.M.L.Saggar, Addl.A.G., Haryana and
Ms. Palika Monga, AAG, Haryana
for the respondents-State.

Mr.H.N.Mehtani,Advocate
for the respondent-Haryana Public Service Commission

...

S.S.Nijjar, ACJ

On the request of the counsel for the petitioners, these writ petitions (CWP Nos.6099, 5437, 2839, 14371, 6258, 7683, 14317, 4818, 14370, 16951, 18572, 4457, 12540, 3768, 2897 of 2005) are taken up for final disposal, at the motion stage. This common judgment will dispose of all the aforesaid writ petitions, as the facts as well as the legal issues are identical in all the writ petitions.

The petitioners seek the issuance of a writ in the nature of Mandamus directing the respondents to issue appointment letters to them as they have all been duly selected to the Haryana Civil Services (Executive Branch) (hereinafter referred to as the "HCS (EB)") and/or to the Allied Services, pursuant to the result declared by the Haryana Public Service Commission-respondent no.2 (hereinafter referred to as "the Commission") on 30.12.2004. The petitioners also pray for the issuance of a writ in the nature of certiorari quashing the Notification dated 13.5.2005 (Annexure P-1) issued by the State of Haryana-respondent no.1 whereby the cadre strength of the Haryana Civil Services (Executive Branch) has been reduced from

300 to 230.

We may notice at the threshold the essential facts culled out from the pleadings, which are relevant for the adjudication of the controversy raised in these writ petitions.

The petitioners claim that they had applied in response to an advertisement issued by respondents no.1 and 2 on 24.1.2004, for filling up 102 posts in the HCS (EB) and Allied Services. The recruitment, appointment and conditions of service of the HCS (EB) is governed by the Punjab Civil Services (Executive Branch) Rules, 1930, as applicable to the State of Haryana (hereinafter referred to as "the 1930 Rules"). The appointments to the service are made on the recommendations of the Commission. The selection process consisted of written examination followed by interview. The procedure for selection and appointment is contained in the Schedule attached to the statutory rules known as Punjab Civil Services (Executive Branch) Haryana Amendment Rules, 2002 (hereinafter referred to as "2002 Rules"). The advertisement dated 24.1.2004 and the subsequent selection process was conducted in accordance with the Schedule mentioned in Rule 9 of the aforesaid 2002 Rules. The preliminary examination was held on 23.5.2004. The main written examination was held from 1.8.2004 to 10.8.2004. The result of the main written examination was declared on 7.12.2004. Interviews were held from 15.12.2004 to 18.12.2004. The result was declared on 30.12.2004. As noticed earlier, all the petitioners were declared to have been duly selected. They were, therefore, awaiting appointment orders when the Election Commission of India (hereinafter referred to as "the Election Commission") announced the elections to the Legislative Assembly in the State of Haryana

on 17.12.2004. Polling was to be conducted on 3.2.2005. The Election Commission also issued a Notification dated 17.12.2004, enforcing the Model Code of Conduct which was to be observed during the period of election. Clause 3 (d) of the Model Code of Conduct provided that from the date elections are announced by the Election Commission, ministers and other authorities shall not make any ad hoc appointments in Government, Public Undertakings etc. which may have the effect of influencing the voters in favour of the party in power. Clause 4 of the Notification banned the transfer of officers/officials connected with the conduct of the elections, in a number of departments. It was further provided in Clause 4 (vi) that the ban shall be effective till the completion of elections. On 23.12.2004, the Election Commission issued another letter to the Chief Secretary of the Government with the following directions:-

> ".....The Commission has therefore directed that the State Government shall not issue appointment letters to the selected candidates without the permission of the Commission so long as the model code of conduct is in operation. The Commission further directs that this directive of the Commission be implemented immediately and a compliance report sent by return fax.
>
> Yours faithfully
> sd/-K.Ajaya Kumar,
> Secretary."

This letter was followed by another letter to the Chief Secretary dated 27.12.2004, in which the following directions were issued:-

> ".... I have been directed by the Commission to clarify

> that the ban on appointments imposed by the Commission is equally applicable to the candidates selected by the Haryana Public Service Commission and/or by any other agency in the State. Accordingly, the Commission hereby directs that the State Govt. shall not offer appointments to candidates selected by the Haryana Public Service Commission or any other recruiting agency including the Ministries and Departments without the prior permission of the Commission till the completion of the elections in the State. Appropriate instructions to this effect may be issued to all concerned immediately."

After the issuance of these instructions, the State of Haryana did not offer appointments to the selected candidates. The petitioners approached this Court by filing writ petitions challenging the instructions issued by the Election Commission. During the pendency of these writ petitions, the State of Haryana issued Notification dated 13.5.2005 whereby the cadre strength of the service has been reduced from 300 to 230 posts. The petitioners allege that the aforesaid exercise has been conducted only to defeat their claim. Thus, the writ petitions have been amended and the Notification dated 13.5.2005 has also been challenged.

All the learned counsel for the petitioners have argued in unison that the respondents have illegally and arbitrarily reduced the cadre strength from 300 to 230. The reduction in cadre strength has been made in violation of 1930 Rules. The procedure prescribed under Rule 3 has not been followed. The Cadre Review Committee has not been formed.

Mr.Jaspal Singh, learned Sr. Counsel submits that the cadre strength had been fixed by Notification dated 18.11.2003. The same strength was to remain intact till December 2006, as under the Rules, the Cadre strength is to be reviewed every three year. Therefore, even if the Notification dated 13.5.2005 is to be held valid, it can have only prospective effect. It cannot affect the vested rights of the petitioners to be appointed on the vacancies which had existed prior to the Cadre Review that has been done by Notification dated 13.5.2005. The whole exercise, according to the learned Sr. Counsel, is mala fide, and therefore, vitiated. In support of these submissions, learned Sr. Counsel relies on the judgment of the supreme Court in the case of **P.Mahendran and others vs. State of Karnataka and others, (1990) 1 Supreme Court Cases 411.** Learned Sr. counsel also made a reference to the detailed charts of the vacancies which have been attached with the pleadings. These charts, according to the learned Sr. Counsel, clearly establish that the vacancies actually exist. Since the vacancies were available, the vested rights of the petitioners for consideration for appointment could not be taken away. Learned Sr. counsel relied on the observations of the Supreme Court in the case of **N.T.Devin Katti and others vs. Karnataka Public Service Commission and others, (1990) 3 Supreme Court Cases 157**. Learned Sr. Counsel further submits that some officers have been discharging functions of more than one post. Some posts have been and are, occupied by Officers who do not even belong to the HCS (EB)/Allied Services. This, according to the petitioners, would clearly establish that the action of the respondents in reducing the cadre strength from 300 to 230 is an eye-wash. The exercise has been conducted only to defeat the claims of the petitioners.

Mr.Jaspal Singh, learned Sr. Counsel has also submitted that in the guise of alteration, the respondents have redetermined the cadre strength. The Notification dated 13.5.2005 states that it is in modification of the order dated 18.11.2003. It actually determines the strength and composition of the cadre for a period of three years from 13.5.2005 to 12.5.2008. According to the learned counsel, the term "alter" is not synonymous with the word "change". The term "to change" is "to substitute one thing with another"; whereas the term "alter" is merely to do with "some change". Therefore, the term "alter" in Rule 3(2) and the proviso of the 1930 Rules means not a drastic change in the cadre. It envisages only some change in the cadre. It does not mean that the composition of the cadre can be changed beyond recognition. In support of this submission, the learned Sr. Counsel has relied on a Full Bench judgment of the Patna High Court in the case of **Fulo Singh and others v. State, AIR 1956 Patna, 170 ((FB)** and the judgment of the Allahabad High Court in the case of **Zamir Qasim v. Emperor AIR (31) 1944 Allahabad 137 (FB)**. In **Fulo Singh's case (supra),** it has been observed as under:-

> "(9)..... According to some, the word "alter" has a very wide significance, whereas, according to others, it is far more limited than what is conveyed by the word "reverse". The majority view in the Full Bench case of the Allahabad High Court concedes that the word "alter" is a less radical expression than the word "reverse" and means "change in form" without changing the underlying character of the thing to be changed. The

> dissentient view in that case appears to be that the word "alter" has been used in juxtaposition with "reverse" and this implies that alteration is a process of a much more limited scope than "reversal".
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> The word "alter" has merely to do with some change, while maintaining the form, the shape or figure. It has the shade of meaning similar to the word "modify" and is opposed to such meanings constituted by such words like "reverse", "annul" or "rescind". I am not prepared to accept the majority view of the Allahabad High Court that, so long as the sentence is not enhanced, there is no change in the form, although the order of acquittal has been substituted by an order of conviction."

To emphasize the distinction, learned Sr. Counsel relied on the entries with regard to the terms "alter, alteration and determined" as given in RANDOM HOUSE UNABRIDGED DICTIONARY (NEWLY REVISED AND UPDATED). The aforesaid entries are as under:-

> "**Alter**, v.t. **1.** to make different in some particular, as size, style, course, or the like; modify: coat; to alter a will; to alter course. **3.** to change, become different or [1350-1400; ME < OF alterer < LL alterare to worsen, deriv. Of L alter other}- **alter.er**, n-Syn. **1.** see adjust, change.

> **Alteration,** n. **1.** the act of altering, the state of being altered: Alteration prove the dress. **2.** a change, modification or to determine, determining- n. **2.**something determines. **3.**a graphic symbol used in ideographic writing to denote a semantic class and written to a word to indicate in what semantic category word is to be understood, thus at times distinguisable homographs.
>
> **Determined 1.**resolute; staunch; the determined defenders of the Alamo. **2.**decided; settled; resolved. **3.**Gram. (of a phonetic feature) predictable from its surrounding context.

Learned Sr. counsel submitted that the first exercise for redetermination of the cadre strength was done in the year 1990. Rule 3 was violated when the strength was reduced from 300 to 230 as earlier it was 240. This, according to the learned Sr. Counsel, is not an alteration, but determination. He submitted that alteration would only permit a certain amount of variation. He relies on the definition of the term "variation" as contained in the Oxford English Dictionary which is as under:-

> "**Variation**
>
> **3.**The act of varying in condition, character, degree, etc. over time or distance, or among a number of instances; the fact of undergoing change or alteration, esp. within certain limits: the degree or amount of this.
>
> **4.**An instance of varying or changing; a change in

something, esp. within certain limits; a difference due to some change or alteration E17.

6.The action or an act of making some change or alteration, esp. (LAW) in the terms of an order, trust, contract etc."

Learned Sr. Counsel for the petitioners further submitted that the respondents cannot be permitted to argue that the petitioners have no right to be appointed. All the learned counsel are agreed that the petitioners do not have an indefeasible right to be appointed. They, however, submitted that the respondents cannot be permitted to act arbitrarily only to deny appointment to the petitioners. It is submitted that the respondents are deliberately denying the appointment as the selection had been made during the regime of the previous government. Learned Sr. Counsel submitted that the power conferred on the State Government under Rule 3 cannot defeat the provisions of Haryana Civil Services (EB) and Allied Service and other Services Common/Combined Examination Act, 2002 (hereinafter referred to as "the 2002 Act"). According to the learned Sr. Counsel, by virtue of Section 4(1) of the 2002 Act, no appointment can be made to any post or service to which the said Act applies beyond the number of posts advertised. Section 4(2) provides that notwithstanding anything to the contrary contained in any judgment, order or decree or decision of court of law, Act, Rule, Regulation or Executive instructions, no candidate shall have right to seek appointment beyond the number of advertised posts. Therefore, the petitioners having been duly selected would have a right to be appointed against the advertised posts.

Mr.Jaspal Singh, learned Sr. Counsel also submitted that the

petitioners are entitled to seek appointment on the equitable principle of promissory estoppel. In support of this submission, the learned Sr. Counsel has relied on the judgments of the Supreme Court in the case of **Bhim Singh and others vs. State of Haryana and others (1981) 2 Supreme Court Cases 673** and a judgment of the Division Bench of the Delhi High Court in the case of **Kanishka Aggarwal v. University of Delhi and others, AIR 1992 Delhi 105.**

Certain additional points were also raised by Mr.Chatrath, learned Sr. Advocate appearing on behalf of the petitioners in CWP No.14371 of 2005. Learned Sr. Counsel submits that he will adopt the arguments advanced by Mr. Jaspal Singh, learned Sr. Advocate. He, however, emphasized that the pleas taken by the respondents are not only fallacious, but are against the record. The respondents have wrongly stated that 48 posts were increased in the Cadre at the instance of the HCS (EB) Officer's Association (Regd.). In fact out of these 48 posts, 35 have been retained. Posts which existed prior to 1990 have been abolished. Higher duties have been given to Officers of the lower cadre. All the nominees from Registers A-I, A-II and Register C have been appointed. Only candidates selected against Register B, as a result of the competitive examination, have been denied appointments. Factually, he submitted that vacancies are still available against which the petitioners can be appointed. Procedure prescribed under the Rules has to be meticulously followed. In support of this submission, learned Sr. Counsel relies on the judgments of the Supreme Court in the cases of **State of Uttar Pradesh v. Singhara Singh and others, AIR 1964 Supreme Court 358, Hukam Chand Shyam Lal v. Union of India and others, AIR 1976 Supreme Court 789, Chandra Kishore Jha v. Mahavir Prasad and Ors,**

JT 1999 (7) SC 256, M.S.Ahlawat v. State of Haryana and Anr. JT 1999 (8) SC 530. Learned Sr. Counsel also submitted that the Commission is a constitutional body. In normal circumstances, recommendations of the Commission deserve to be given full respect and accepted in the absence of proven mala fide. In support of this submission, learned Sr. Counsel relied on a Division Bench judgment of this court in the case of **Raj Kumari v. State of Punjab and others, 2005(1) SCT 287** and a single Bench judgment of this court in the case of **Paramvir Singh and others v. State of Punjab and others, 2003 (4) RSJ 162.** As a parting shot, learned counsel has relied on the latest judgment of the Supreme Court in the case of **Inderpreet Singh Kahlon and others v. State of Punjab & Ors., JT 2006 (5) SC 352.** He submits that pendency of the Vigilance or CBI enquiry is no justification to deny appointments to the petitioners. Such a decision could only be taken on completion of the enquiry; that too, only after giving an opportunity to the petitioners to meet, any adverse findings that may be recorded in the enquiry.

Learned Sr. Counsel further submitted that the reliance placed by the respondents on the Full Bench judgment of this Court in the case of **Amarbir Singh and others vs. State of Punjab and others, 2003 (5) SLR 398** is misplaced. The aforesaid judgment has been specifically over-ruled by the Supreme Court.

Mr. Rajiv Atma Ram, learned Sr. Advocate appearing on behalf of the petitioners in CWP No.5437 of 2005, has also adopted the arguments of Mr. Jaspal Singh, learned Sr. Advocate. He has, however, made detailed independent submissions also. Learned Sr. Counsel submitted that under Clause 7 (vi) (d) of the Model Code of Conduct for elections, only an ad

hoc appointment cannot be made. Appointment on regular basis can be made. Learned Sr. Counsel relied on a Division Bench judgment of this Court in the case of **Babita Gupta vs. State of Punjab and others, 1998(4) RSJ 408** and a judgment of the Supreme Court in the case of **I.J.Divakar and others v. Government of Andhra Pradesh and another, AIR 1982 Supreme Court 1555.** Learned Sr. Counsel further submitted that requisition once sent to the Commission for making recommendations for appointment could not be subsequently withdrawn. In the aforesaid case, a direction was given to complete the selection and make the appointments. It was further directed that only on exhaustion of the list, other appointments could be made. Learned Sr. Advocate further reiteriated that appointments cannot be denied without legal justification. He relied on the judgment **R.S.Mittal v. Union of India, JT 1995 (3) S.C. 417.** Learned Sr. Counsel further reiterated that even if cadre review is accepted, vacancies are still available against which the petitioners can be appointed. He submitted that in accordance with 1930 Rules in a block of 28 vacancies, 19 would fall to the share of the direct recruits. It is accepted by the respondents that promotees are working in the service in excess of their quota. However, the respondents plead that the excess is due to the unrealistic inflation of the cadre strength by the previous government. Learned Sr. Counsel pointed out that direct recruitment in this case is also open to candidates from the different Registers. Government cannot challenge the correctness of the orders passed by the previous government being successors in office and now as respondents in the present writ petition. In support of the proposition, learned Sr. Counsel relied on a judgment of the Supreme Court in the case of **State of Assam and anr. v. Raghava Rajgopalachari, 1972**

SLR 44, a judgment of the Delhi High Court in the case of **Joginder Pal Singh v. Union of India and others, 1983 (3) SLR 252** and a judgment of this Court in the case of **Punjab Tourism Development Corporation vs. Presiding Officer, Labour Court, Amritsar and others, 1997 (1) AIJ 15.** Learned Sr. counsel has thereafter emphasized the adverse effects of the denial of appointments at this stage and also the prejudice it would cause to the petitioners. They would be adversely affected in the fixation of their salary, seniority and benefit of experience. He submitted that in this case, interim orders restraining the appointments ought not to have been given as the selected candidates cannot be compensated. He relied on a Full Bench judgment of this Court rendered in the case of **Sukhdev Singh Sidhu and others v. State of Punjab and others 2003 (3) RSJ 299.** Learned Sr. Counsel further submitted that appointment on 37 posts in the executive branch and all the 44 posts of allied services cannot even be denied on the ground of cadre review. The cadre review is limited only to the certain number of posts falling in the Executive Branch. There is no finding till today that selection is vitiated. Enquiry is still going on. Mere allegations of irregularities are not sufficient to deny appointment to the petitioners. Learned Sr. Counsel relied on a Division Bench judgment of this Court in the case of **Girish Arora v. State of Haryana, 1997 (3) SCT 240.** Reiterating the submissions of the petitioners on the arbitrariness of the cadre review committee, the learned Sr. Counsel submitted that in this exercise, posts which fall to the share of direct recruits have been deliberately reduced to accommodate promotees. Otherwise, those promotees working in excess of the quota would have to be reverted. It is further submitted that a closer look of the cadre review would show that the

posts deleted are not the posts which are alleged to have been increased by the former regime. The plea raised by the respondents is, therefore, against the record. The respondents have no legal justification for denying the appointment to the petitioners. The instructions issued by the Election Commission in letters dated December 23, 24 and 27 of 2004 are beyond their jurisdiction. The Model Code of Conduct for holding elections does not cover regular appointments. It only covers ad hoc appointments.

Mr.P.S.Patwalia, learned Sr. Counsel appearing on behalf of the petitioners in Amended CWP No.2839 of 2005 has also adopted the arguments of the earlier counsel appearing for the petitioners. Mr. Patwalia, learned Sr. Counsel has further made a grievance that prior to elections, it had been announced at political rallies as well as in the newspapers that if the Congress Party came to power, it would not make any appointments on the basis of the selections made during the time of the previous regime. This, according to the learned Sr. Counsel, is a clear indicator that the whole exercise for reduction of the cadre strength is mala fide. It has been undertaken only to deprive the petitioners of the appointments, after being duly selected in accordance with law. He has further submitted that the allegation that the Commission has rushed through the selection, is contrary to the record. Learned Sr. counsel pointed out that the selection has been made on the basis of the 2002 Rules which have been published on 30.9.2002. Under these Rules, time frame is prescribed. In accordance with these rules, first selection was made in the year 2003. The selection was challenged in the Supreme Court. State of Haryana filed an affidavit stating that time frame will be complied with. Rule 3 prescribes the Scheme for each year. The result was not declared because of the interim stay

granted by this court which was subsequently vacated by the Supreme Court. Thus, the result was declared on 30.12.2004. With regard to the deliberate inflation of the cadre strength, learned Sr. Counsel submitted that the facts have been wrongly pleaded. In 2003, total of 48 posts were added. Besides, 35 posts exist even today. The Government has abolished even the posts which had continued since 1990.In any case, even if the cadre is reduced, still 11 posts are vacant. The respondents have themselves pleaded that 10 posts have been kept for unforeseen circumstances. Some of the petitioners can still be accommodated, in case the present government was to act in a fair and reasonable manner.

Mr.R.K.Malik, learned counsel appearing on behalf of the petitioners in CWP No.2897 of 2005, submitted that even if the post in the cadre is to be abolished, it must be a functional abolition and not notional. In support of the proposition, the learned counsel relied on a Division Bench judgment of this Court in the case of **Prem Chand, Naib Tehsildar vs. The State of Haryana 1989 (2) SLR 556**. In the present case, abolition of posts is only a paper-transaction. Functions on these posts have in fact increased. Additional charge has been given to numerous promotee officers. These officers are occupying the posts meant for direct recruits. Learned counsel further submitted that even if the cadre is reduced from 300 to 230, still appointments should be made on the 230 posts. Even then 156 posts would fall to the share of direct recruits. Against this only 119 direct recruits are working. Therefore, 37 more appointments can be made, even on the basis of the reduced strength. Learned counsel submitted that there is no justification for denying even provisional appointment to the petitioners, subject to the outcome of the enquiry. Action of the respondents is vitiated

by mala fide and arbitrariness. According to the learned counsel, it is a complete negation of Articles 14 and 16 of the Constitution of India.

On the other hand, Mr. H.S.Hooda, learned Advocate General, Haryana submitted that the Government has power to review the cadre strength. Recommendations were made by the Commission, even after the letter dated 27.12.2004 written by the Election Commission. Besides, a large number of writ petitions have been filed alleging that the selection was tainted. Now the petitioners have filed the present writ petitions. Referring to the 1930 Rules, the learned Advocate General submitted that Rule 3 gives wide power to the Government to review the cadre even within three years. The rule has to be read as a whole. The Government has absolute discretion to restructure the cadre. No reason as such has to be recorded. It has to be a subjective satisfaction of the Government. Redetermination of the cadre strength is a purely administrative exercise resulting in a purely administrative order. At the time when the decision was taken to redetermine the cadre strength from 300 to 230, the petitioners did not have any legal right. Therefore, no Mandamus can be issued by this Court directing that the petitioners be appointed. The appointments will undoubtedly be made in accordance with the rules. Learned Advocate General further submitted that there is no arbitrariness in the decision taken by the respondents. But in this case detailed reasons are available on the record, which have been made available to the Court. He further submits that a conscious and responsible decision has been taken by the Council of Ministers. Moreover, in redetermination of the cadre, the Scheme under the Rules has been meticulously followed. Material facts have been taken into consideration. The Courts in judicial review will only examine the decision

making process and will not examine the decision on merits. Once the decision is based on due consideration of the relevant material, it cannot be said to be arbitrary, capricious or in colourable exercise of power. Learned Advocate General further submitted that the cadre strength was reduced because the cadre strength of IAS in the State was reduced. The earlier Cadre Review Committee had initially recommended cadre strength of 180. Then representations were received from the HCS (EB) Officers for increase by 48 posts. This was accepted by the previous regime, without any justification. Ultimately, the cadre strength was inflated to 300. Therefore, a conscious decision has been taken to reconsider and refix the cadre strength. The Government has now fixed the cadre strength at 230. In other words, the Government has accepted the earlier recommendations. There was no need to reconstitute a fresh cadre review Committee. The earlier Cadre Review Committee has fixed the cadre strength at 230. It was increased to 300 on the Government accepting the representation of the HCS officers and on the direction of the then Chief Minister. Learned Advocate General emphasized that as a principle of law, a writ in the nature of Mandamus cannot be issued for appointments merely on the selection of the candidates. No legal right of the petitioners has been infringed. In support of the aforesaid proposition of law, the learned Advocate General relied on the following judgments of the Supreme Court and the High Courts:-

(1)The State of Haryana vs. Subash Chander Marwaha and others (1974) 3 Supreme Court Cases 220;

(2)Mani Subrat Jain and others vs. State of Haryana and others, 1977 (1) Supreme Court Cases 486;

(3)Jatinder Kumar and others vs. State of Punjab and others (1985) 1 Supreme Court Cases 122

(4)Shankarsan Dash v. Union of India (1991) 3 Supreme Court Cases 47;

(5)Dr.H.Mukherjee v. Union of India and others, 1994 Supp. (1) Supreme Court Cases 250;

(6)Dr.P.K.Jaiswal v. Ms. Debi Mukherjee and others, (1992) 2 Supreme Court Cases 148;

(7)Girish Arora and others vs. State of Haryana and another, 1997(5) SLR 660;

(8)Ludhiana Central Cooperative Bank Ltd. v. Amrik Singh and others (2003) 10 Supreme Court Cases 136;

(9)Hashni Kumar vs. State of Punjab and others, 2004(7) SLR 793;

(10)Sunita Rani and others vs. State of Punjab and others, 2005(1) RSJ 712

(11)Bhupender Singh vs. State of Haryana, 2005(3) RSJ 724;

(12)State of Haryana etc. vs. Satya Parkash etc., 1990(1) PLR 352;

(13)S.S.Dhanoa v. Union of India and others, JT 1991(3) SC 290;

(14)S.Partap Singh v. State of Punjab, AIR 1964 Supreme Court 72;

(15)E.P.Royappa v. State of Tamil Nadu and another, AIR 1974 Supreme Court 555;

(16)Y.Katoch v. Union of India and another, 2003(3) RSJ 474;

(17)N.Ramanatha Pillai v. State of Kerala, AIR 1973 Supreme Court 2641;

(18)M/s Motilal Padampat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh and others, AIR 1979 Supreme Court 621;

(19)National Buildings Construction Corporation v. S.P. Singh and others, AIR 1998 Supreme Court 2779;

(20)Dr.Ashok Kumar Maheshwari v. State of U.P. And another, AIR 1998 Supreme Court 966.

(21)Harbans Singh Jalal, Ex.MLA, Bathinda v. Union of India, (1997) 2 PLR 778 and

(22)Haryana Public Service Commission through Controller of Examination v. State of Haryana and others, 2005(3) PLR 486.

Relying on the observations made in the case of **Jatinder Kumar (supra),** the Advocate General has submitted that the Government is answerable to the Legislature, in case it decides not to accept the recommendations of the Commission. Reasons have to be given by the Government to the Legislature. Therefore, it cannot even be said that absolute power has been vested in the Government to accept or not to accept the recommendations. The procedure to be adopted by the Government in case the recommendations of the Commission are not accepted, is given in Article 320 sub-article (3) of the Constitution of India. The aforesaid procedure has been complied with. The reasons will be made available to the Legislature after completion of formalities. Factually, the learned Advocate General submits that the petitioners cannot be given the jobs as they simply do not exist. In any event, enquiry is still pending. No statutory right exists in favour of the petitioners to seek issuance of a writ in the nature of Mandamus.

Mr. Mehtani, learned counsel appearing for the Commission submitted that the recommendations have been made according to the requisition. At the time when the recommendations for appointment were

made, the vacancies did exist. According to the learned counsel, subsequent events would not affect the cadre strength. The State has taken a contradictory stand. He submitted that allegations against the Commission have been made only to nullify the selection. He relied on the Full Bench decision of this Court rendered in the case of **Jaskaran Singh Brar v. State of Punjab and others, 2005 (1) RSJ 508.** Learned counsel further submitted that the Government can refuse to accept the recommendations of the Commission only in rarest of rare cases. The action of the Government in the present case has to be deprecated. It is a deliberate attempt to over-awe the Commission in its independent functioning from the Government. Learned counsel further submitted that the Election Model Code of Conduct does not cover regular selections. The Notification itself is related only to ad hoc selection. The selection is impartial. The selection was not tainted with irregularities. The respondent-State of Haryana has not put forward any material to show as to how the selection was tainted. Learned counsel relied on a Division Bench judgment of this Court in the case of **Girish Arora (supra)**. According to the learned counsel, the relevant principles have been culled out in para 36 of the said judgment.

In reply, Mr. Hooda, learned Advocate General has submitted that in the absence of mala fide, the Court will refrain from interfering with the decision of the Government. According to him General, allegations of mala fide are to be proved beyond reasonable doubt. In support of this proposition, the learned Advocate General relied on the judgments of the Supreme Court rendered in the cases of **S.Partap Singh (supra), E.P.Royappa (supra)** and a Division Bench judgment of this Court rendered in the case of **Y.Katoch (supra).** Learned Advocate General

further submitted that whether or not any particular post is to be abolished is a policy decision, and therefore, cannot be set aside in writ proceedings. He relied on the judgment of the Supreme Court in the case of **N.Ramanatha Pillai (supra)**. Rebutting the arguments of Mr. Jaspal Singh on estoppel, learned Advocate General relied on the judgment of the Supreme Court in the case of **M/s Motilal Padampat Sugar Mills Co. Ltd. (supra).** Learned Counsel submitted that directions given by the Election Commission are not in excess of its jurisdiction.

We have noticed the arguments of the learned counsel for the parties very elaborately as the matter had been argued at length. As noticed in the earlier part of the judgment, an enquiry by the State Vigilance Bureau has already been ordered in some of the writ petitions filed by some of the unsuccessful candidates. We had proposed to adjourn these matters sine die also, to be listed on the conclusion of any enquiry. However, counsel for the petitioners had very strenuously argued that no enquiry has been ordered in the present cases and the writ petitions can be heard on merits.

Although we have noticed the arguments of each individual counsel, independently and elaborately, it would not be necessary to consider them individually. They can all be considered together. The first argument of learned Sr.Counsel for the petitioners is about the illegal reduction of cadre strength. From the pleading of the parties, it emerges that the strength and composition of the cadre is to be determined by the Government from time to time. Exercising this power, the Government determined the strength of the cadre on 7.11.1990 at 240 posts. The next Review Committee on 20.10.1999 again fixed the cadre strength at 240 posts. The then Government was of the opinion on 25.5.2001 that there is a need to reduce

the cadre strength of HCS to about 210 posts. Then the cadre strength was reviewed under Rule 3 in the year 2002. The Cadre Review Committee was requested to add 17 posts on a representation made by members of the HCS (EB) Officers' Association (Regd.). The Cadre Review Committee accepted only eight posts. The Cadre strength was determined at 223. Then again on the representation of the aforesaid Association, 48 posts were added in the cadre. However, 26 posts were deleted. The actual cadre was determined at 180 and the cadre strength for recruitment was determined at 271. Thereafter there was an addition of 20 more posts. The permanent cadre was made 200 and the recruitment strength was fixed at 300. Thereafter 20 more posts were added. After conducting a rationalisation exercise, the Government fixed the cadre strength at 230 by order dated 13.5.2005. The aforesaid facts indicate that the argument of the petitioners is clearly based on misconception that the cadre strength has been reduced. It appears that the cadre strength has been between 180 to 230 posts from 1990 onwards. It would, therefore, not be possible to accept the submission of the learned counsel for the petitioners that there has been any unfair motive in the issuance of the Notification dated 13.5.2005 by the respondents to fix the cadre strength. We are also unable to say that the redetermination and determination of the cadre strength is contrary to Rule 3 of the 1930 Rules. Rule 3 provides as under:-

> "**3.Strength of Cadre- (1)** The strength and composition of the Haryana Civil Service (Executive Branch) Cadre shall be such as may be determined by the Government from time to time.
>
> (2)The Government shall, at the interval of every

> three years, re-examine the strength and composition of the Haryana Civil Service (Executive Branch) Cadre and may make such alterations therein as it deems fit:
>
> Provided that nothing in this rule shall be deemed to affect the power of the Government to alter the strength and composition of the Cadre at any time."

A bare perusal of Rule 3 (1) would show that the strength and composition of the service has to be determined by the Government from time to time. This Clause is self-contained and is not controlled by any subsequent provision of the Rule. Rule 3(2) postulates that the Government shall re-examine the strength and composition of the cadre at the interval of every three year. This Clause cannot be read to mean that there can be no re-examination of the cadre strength prior to three years. In our opinion, the more reasonable interpretation would tend to suggest that the strength and composition of the cadre can be re-examined by the Government at any time. In case, for any reason, there is no re-examination of the cadre for some time, it shall certainly be done after interval of every three year. If upon re-examination at the interval of three years, the Government deems it fit to make any alteration therein, it may do so. This interpretation flows naturally when Rule 3 is read as well. If there is any doubt with regard to the power of the Government to re-examine the strength of the cadre prior to three years, after a particular redetermination, the same is certainly removed by the proviso. It is clearly provided that nothing in the main rule shall be deemed to affect the power of the Government to alter the strength

and composition of the cadre at any time (Emphasis supplied). We, therefore, hold that the Government had the power to re-examine the cadre strength and to issue the Notification on 13.5.2005. We are unable to accept the submission of Mr. Jaspal Singh, learned Sr.Counsel that the cadre strength could not have been redetermined prior to three years from the last notification dated 18.11.2003. We cannot accept the submission that till December 2006, the cadre strength as fixed on 18.11.2003 will remain intact, inspite of the Notification dated 13.5.2005. Furthermore, it would not be possible to hold that the redetermination of the cadre strength by Notification dated 13.5.2005 would not fall within the purview of the terms "alter" or "alterations" as envisaged under Rule 3 (2) and the proviso to Rule 3. We have no reason to doubt the correctness of the definitions of the terms "alter", "alteration" and "variation" as given in the RANDOM HOUSE UNABRIDGED DICTIONARY (SUPRA) and the definition of the term "variation" as contained in the Oxford English Dictionary. The Patna High Court has noted the view taken by the majority of the Full Bench of Allahabad High Court. A perusal of the same would show that the term "alter" has been interpreted in contrast to the word "reverse". The word "reverse" has been equated to terms like "annul" or "rescind" whereas the word "alter" has been expressed to mean only some change without changing the underlying character of the thing to be changed. These observations, however, would be of no assistance to the case put forward by Mr. Jaspal Singh. We are of the opinion that the Notification dated 13.5.2005 does not bring about any drastic change in the cadre strength. It rather reinforces the decision of the earlier Cadre Review Committee, prior to the artificial inflation of the cadre by addition of 60 posts. It is also not

possible to accept the submission of Mr. Jaspal Singh and the other counsel appearing on behalf of the petitioners that since no Cadre Review Committee was formed, the Notification dated 13.5.2005 is in non-compliance of Rule 3. We have earlier reproduced the recital in the Notification dated 13.5.2005. A perusal thereof clearly shows that the Notification has been issued by the Governor under Rule 3. The strength of the cadre had been determined for a period of three years i.e. 13.5.2005 to 12.5.2008. We are of the opinion that in view of the wide powers enjoyed by the Government under Rule 3 to review the cadre strength at any time, the dates mentioned in the Notification cannot be held to be sacrosanct. It is not that any subsequent government would be powerless to re-determine the cadre strength prior to 12.5.2008. As already observed by us, the three years provided under Rule 3 is a maximum interval within which the Government has to redetermine the cadre strength. The period so prescribed is not a bare minimum. We do not agree with the submission of Mr. Jaspal Singh that the Notification dated 13.5.2005 has not been issued by the Government. The Notification issued in the name of the Governor would not make it, any-the-less, a notification issued on behalf of the Government. Indeed, under Article 166 of the Constitution of India, all executive action of the Government of a State is required to be expressed to be taken in the name of the Governor. We are, therefore, not at all impressed by the arguments of Mr. Jaspal Singh that the notification dated 13.5.2005 has not been made by the Government and that there was also no requirement to have a fresh cadre review. We are inclined to accept the explanation given by the learned Advocate General, Haryana. Mr. Hooda, on the basis of the pleadings and the record has demonstrated that since the

original recommendation made by the Cadre Review Committee in respect of 240 posts was accepted, there was no need to constitute a fresh Cadre Review Committee. This apart, we are of the opinion that under Rule 3, the power of determining the strength and composition of the cadre vests in the Government and not in any particular committee of the Government. The Cadre Review Committee is merely an instrument of the Government to suggest a proper strength of the cadre. The ultimate decision has to be taken by the Government. It is also an undisputed fact that the cadre of IAS Officers has been reduced by 10 posts. Therefore, fixing of the cadre strength at 230 posts cannot be said to be whimsical or irrational. The Government has taken a conscious decision for redetermination of the cadre, in normal circumstances, there would be little scope for the Court to interfere in the decision.

Undoubtedly, the Courts can exercise the power of judicial review of executive power in cases of clearly proven mala fide, arbitrariness, or where irrelevant considerations have materially affected the executive decision. These powers are aimed at examining the decision making process and not the merits of the decision itself. The principles with regard to the scope and ambit of the power of judicial review by the High Court under Articles 226/227 of the Constitution have been extensively examined by the Supreme Court in a catena of land-mark judgments. In the case of S.P.Gupta V. Union of India and another, 1981 (Supp) SCC 87, the Supreme Court has observed as under:-

> "It is also necessary for the Court to bear in mind that there is a vital distinction between locus standi and justifiability and it is not every default on the

> part of the State of a Public authority that is justiciable. The Court must take care to see that it does not overstep the limits of its judicial function and trespass into areas which are reserved to the Executive and the Legislature by the Constitution...."

Again in the case of **Tata Cellular vs. Union of India, JT 1994(4) SC 532,** the Supreme Court considered the scope of judicial review and approved the observations of *Lord Brightman* in the case of **Chief Constable of the North Wales Police Versus Evans, (1982) 3 All E.R. 141 (at page 154).** In paragraph 91 of the aforesaid judgment, the Supreme Court observed as follows:-

> "91.Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself."

The Supreme Court made the ratio even further clear in paragraph 95 of the judgment as under:-

> "95.Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:-

> (i)Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
>
> (ii)irrationality, namely, Wedenesbury Unreasonableness.
>
> (iii)Procedural impropriety."

Applying the aforesaid test, we have examined the record produced by the State of Haryana with regard to the reduction in the cadre strength. The entire record has been made available by the State of Haryana, without any hesitation. Mr.Jaspal Singh, learned Sr. Counsel and other counsel appearing on behalf of the petitioners were permitted to examine the record by order dated 10.11.2005 passed by this Court.

Learned counsel for the petititioners submit that the plea taken by the State of Haryana that the cadre was unnecessarily inflated by the previous Government is not supported by the record. The Government had not reached any such decision. They made a particular reference to the order of reduction of the cadre dated 22.4.2005. Mr.Jaspal Singh, learned Sr. Counsel submitted that the language of the note is an eloquent example of the bureaucratic non-committal language. He made a particular reference to the following paragraphs:-

> "This case is regarding the fixing of strength of HCS (EB) cadre in the State. The last cadre review was held in the year 2003 when the strength of this cadre was raised from 240 to 300 in one go. The issue of cadre management and the need for removing the distortions that have crept in the cadre due to a very heavy, unwieldy size of the

service has necessitated a fresh look at the cadre strength.

As is well known that any post in a cadre is created keeping in view the requirement of a work in administration and availability of funds to meet the expenditure to be incurred on such posts. While doing so, full justification is required to be given for creating a post. The normal practice in Government is that when the exigency of work requires, a post is created on temporary basis for a year and its continuation is reviewed every year and if it is found necessary to have the post to meet the requirement of work then it is allowed to continue for another year. Usually a post is allowed to be continued on temporary basis for a period of five years and then a decision is taken to abolish it or to convert it into a permanent post. While doing so the guiding factor is the requirement of work and the expediture involved in it. Might be, these factors were considered by the Committee constituted to review this cadre in the year 2003. However, it is also felt that a more analytical and deeper exercise was required to be undertaken which perhaps could not be done at the time. It is felt that perhaps the work assessment of various departments was not undertaken and in the

> absence of complete data/information the Committee had to decide without the benefit of an analytical work study."

According to Mr. Jaspal Singh, learned Sr. Counsel, the aforesaid extract does not conclude that there is a deliberate effort by the previous Government to inflate the cadre strength. We are of the opinion that the Sr. counsel is grossly unfair in assessing the order dated 22.4.2005 passed by the Special Secretary Political and Services. If one reads the entire note, a clear picture emerges of the entire case which has been set out by the respondents in the written statement. In fact the order is much more incisive than the pleadings. In our opinion, the noting portion of the official record referred to by Mr. Jaspal Singh, learned Sr. Counsel would even otherwise not create any legal right in favour of the petitioners. The Supreme Court in the case of **Puranjit Singh vs. Union Territory of Chandigarh and others, 1994 (5) SLR** 280 has clearly held as follows:-

> "6.....However, in spite of the clear position in law, he has been pursuing his misplaced claim for counting his seniority prior to his fresh career of Assistant Engineer as a direct recruit and for promotions on the basis of the promotions which he had earned in the organization where he was sent on deputation. For this purpose, he is relying upon certain notings either of the Chief Engineer or the Home Secretary of the Chandigarh Administration. Although it is not known how he came in possession of the said notings, it was

> improper on his part to produce these notings in the Court proceedings, assuming that he had come in possession of them authorisedly. As a responsible officer he ought to know that notings in the departmental files did not create any rights in his favour. It is the orders issued by the competent authorities and received by him which alone can create rights in his favour. This is apart from the fact that even those notings did not spell out any order in his favour. In the circumstances, the authorities on which the learned counsel for the petitioner relied are inapplicable to the facts of the present case."

In view of the above ratio of law, the submissions of Mr. Jaspal Singh could be rejected, without any further consideration. However, in the interest of justice, we have scrutinized the relevant record. Even though, the Court would rather refrain from commenting on the rest of the order in detail, we must notice that the order records the entire history of the recruitment to the cadre since the formation of the State of Haryana. The categoric conclusions indicated in the order are that :-

> (a) From the years 1972 to 2000, the annual intake into the cadre was 10 to 20, excepting the year 1980 when there were only 25 HCS Officers;
>
> (b) In the years 2002 and 2003, the intake was 58 due to a combined examination.
>
> (c) Although for the past 39 years i.e. since the

inception of the cadre, the strength has been around 240.

(d)The actual strength of Officers in position in the Cadre has been below 200 for most of the years.

(e) It is only recently that the cadre was around 220 officers. Over the years there was no additional demand for HCS Officers from any quarter.

(f) The prevailing strength of HCS Officers is sufficient and adequate to meet the requirements of administration. The analysis of the requirement of work done reveals that the present strength of 240 posts is on the higher side.

(g) Even taking into account, provisions for leave or training, the maximum requirement would be 250 posts, but 250 posts are not available within the State of Haryana. Thus, HCS being a premier service of the State, any excessive recruitment would be a sheer waste or drain on state exchequer.

(h) The strength of the cadre was reviewed in the year 1999 and, after taking all the relevant factors/aspects into consideration, it was decided that there was no need to increase the strength of the cadre.

(i) Again the cadre strength was reviewed in the year 2003 when suddenly 60 posts were added.

(j) During these four years i.e. 1999 to 2003, there has been no such thing in the administration which should warrant induction of more HCS officers.

(k) The activities of the State in various departments have been practically the same which were in the year 1999.

(l) During this period, no new department or undertaking of the Government has been created which requires the services of HCS Officers.

(m) Therefore, this addition of 60 posts in this cadre seems to be artificial or not justified. (Emphasis supplied).

Having recorded the aforesaid reasons, the Special Secretary gave the final conclusion as under:-

"This examination makes it clear that the increase in HCS cadre strength has been artificial and not commensurate with the requirement of administration. The addition of 60 posts made in the year 2003 may be done away with and the strength of HCS (E.B.) cadre may be fixed at 230, as per details on NP-32."

In our opinion, the reasons given above justify the conclusion reached by the Government. The aforesaid reasoning given by the Special Secretary was placed before the CM who has approved the same on 29.4.2005. A

perusal of the record also indicates that the Cadre Review Committee to which much reference was made by the learned counsel for the petitioners was constituted by an order issued in the name of the Governor of Haryana dated 25.6.2003. It consisted of a Chairman, two Members and a Member Secretary. All the four were IAS Officers. The Chairman belonged to the 72nd Batch. The two members belonged to the 75th Batch and the Member Secretary belonged to the 85th Batch. The Committee had been given only two weeks to submit its report. The first meeting of the Committee was held on 1.7.2003. On 2.7.2003, a notice was issued to all the Financial Commissioners and Principal Secretaries and Administrative Secretaries to the Government of Haryana. They were requested to assess the requirements of the HCS (EB) Officers in the departments and requested to submit the same to the Member Secretary. The Committee had submitted a unanimous report on 20.8.2003. The final assessment of the cadre as noticed earlier is 230 posts. This was increased on the specific orders of the Chief Minister to 300. Therefore, in our opinion, the record also leads to the conclusion that there was hardly any need for forming a new Cadre Review Committee. The strength recommended by the earlier Committee was merely reiterated in the order dated 22.4.2004. There is no mandate under Rule 3 for the formation of a Cadre Review Committee consisting of a particular number of members. In fact, the Member Secretary who participated in the deliberations of the Cadre Review Committee which culminated in the Notification dated 18.11.2003 is the same Officer who has now made the noting dated 22.4.2004, on the basis of which the Notification dated 13.5.2005 has been issued. He was the junior-most member of the Committee. Therefore, he has adopted a very cautious and polite language

to make his point. But at the same time, he has not caused any embarrassment to his seniors. This attitude of the Officer is to be commended and not condemned. It certainly cannot be used as a lever to doubt the efficacy and the sincerity of the note. Therefore, we are unable to agree with the submission of Mr. Jaspal Singh that there is any infringement of Rule 3 in any manner whatsoever in determination of the Cadre strength by Notification dated 13.5.2005.

We also do not agree with the submission of the learned counsel for the petitioners that the decisions of the State Government for fixing the cadre strength at 230 posts is vitiated by mala fide. In our opinion, the learned Advocate General has correctly relied on the judgment of the Supreme Court in the case of **S.Partap Singh (supra).** In the aforesaid judgment, the Supreme Court has clearly held as follows:-

> "8. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by Government of its powers. While the indirect motive or purpose or bad faith or personal ill-will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the appellant has to establish in this case, though this may sometimes be done (See Edgington v. Fitzmaurice, (1884) 29 Ch D 459). The difficulty is not lessened when one has to establish that a person in the position of a minister apparently acting in the legitimate

> exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. We must, however, demur to the suggestion that mala fide in the sense of improper motive should be established only by direct evidence that is that it must be discernible from the order impugned or must be shown from thenotings in the file which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts."

This rule has been reiterated by the Supreme Court in the case of **E.P.Royappa (supra)** in the following words:-

> "92. Secondly, we must not also overlook that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of creditibility."

To further justify the determination of cadre strength of 230 posts, the learned Advocate General, Haryana has placed heavy reliance on the observations made by the Supreme Court in the case of **N.Ramanatha Pillai (supra).** In this case, it has been held by the Supreme Court as follows:-

> "14.The first question which falls for determination is whether the Government has a

> right to abolish a post in the service. The power to create or abolish a post is not related to the doctrine of pleasure. It is a matter of governmental policy. Every sovereign Government has his power in the interest and necessity of internal administration. The creation or abolition of post is dictated by policy decision, exigencies of circumstances and administrative necessity. The creation, the continuance and the abolition of post are all decided by the Government in the interest of administration and general public."

The law with regard to creation and abolition of posts was again reiterated by the Supreme Court in the case of **S.S.Dhanoa v. Union of India & Ors. JT 1991(3) S.C. 290**. In paragraph 30 of the judgment, it has been clearly held as follows:-

> "30. The last of the contentions advanced on behalf of the petitioner is in two parts. The first part relates to the material loss on account of the cutting short of the tenure of the petitioner. Such loss is not unknown in a service career and is one of the exigencies of employment. The creation and abolition of post is the prerogative of the executive, and in the present case of the President. Article 324(2) leaves it to the President to fix and appoint such number of Election Commissioners as he may from time to time determine. The power to

> create the posts is unfettered. So also is the power to reduce or abolish them. If, therefore, the President, finding that there was no work for the Election Commissioners or that the Election Commission could not function, decided to abolish the posts, that was an exigency of the office held by the petitioner. In fairness to the petitioner, we may record here that Shri Gopal Subramaniam appearing for him made it clear at the very outset that the petitioner had not approached the court to make a grievance of his material loss but to assert the principle that the independence of the Election Commission should not be permitted to be tampered with, either directly or indirectly by the subterfuge of the abolition of the posts. We have dealt with this aspect earlier in quite some detail."

In our opinion, the aforesaid observations fully support the submissions made by the learned Advocate General, Haryana and the view expressed by us that the Notification dated 13.5.2005 is entirely legal and does not suffer from any legal or equitable infirmity.

Since there are no vacancies, no Mandamus can be issued to the respondents to appoint the petitioners. We have noticed that the efficacy of the entire selection has been doubted and enquiry is being conducted by the STATE VIGILANCE BUREAU. This apart, it has been the consistent view of the Supreme Court that mere selection for appointment does not create a legal right which can be enforced by issuance of a writ in the nature

of Mandamus. At this stage, we may notice a few judgments of the Supreme Court which would tend to support the view taken by the Court and the submissions made by the learned Advocate General, Haryana, Mr.Hooda. In the case, **The State of Haryana vs. Subash Chander Marwaha and others, (1974) 3 SCC 220,** the Supreme Court observed as follows:-

> "9. It is rather difficult to follow the reasoning of the High Court in this case. It agrees that the advertisement mentioning 15 vacancies did not give a right to any candidate to be appointed to the post of a Subordinate Judge. Even so it somehow persuaded itself to spell out a right in the candidates because in fact there were 15 vacancies. At one place it was stated "so long as there are number of vacancies to be filled in and there are qualified candidates in the list forwarded by the Public Service Commission along with their Rolls, they have got a legal right to be selected under Rule 10 (ii) in Part "C".
>
> 10.One fails to see how the existence of vacancies give a legal right to a candidate to be selected for appointment. The examination is for the purpose of showing that a particular candidate is eligible for consideration. The selection for appointment comes later. It is open then to the Government to decide how many appointments shall be made. The mere fact that a candidate's name appears in the list

> will not entitle him to a mandamus that he be appointed.....”
>
> 11.It must be remembered that the petition is for a mandamus. This Court has pointed out in *Dr.Rai Shivendra Bahadur v. The Governing Body of the Nalanda College,* that in order that Mandamus may issue to compel an authority to do something, it must be shown that the statute impose a legal duty on that authority and the aggrieved party has a legal right under the statute to enforce its performance. Since there is no legal duty on the State Government to appoint all the 15 persons who are in the list and the petitioners have no legal right under the rules to enforce its performance the petition is clearly misconceived.”

In the case of **Mani Subrat Jain and others vs. State of Haryana and others, (1977) 1 Supreme Court Cases 486,** the Supreme Court has observed as under:-

> “2.The appellants in the writ petitions asked for a mandamus directing respondents no.1 and 2 to appoint the appellants to the posts of Additional District and Sessions Judges. The appellants also asked for a mandamus or an appropriate writ quashing the orders of respondents no.1 and 2 whereby the High Court was informed that the Government was not prepared to appoint the

appellants to the posts of Additional District and Sessions Judges.

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4.The High Court dismissed the petitions on the ground that the appellants had no locus standi to file the petitions. The reason given by the High Court is that the appellants were not appointed and they had no right to be appointed. They had also no right to know why they were not appointed.

9.The High Court rightly dismissed the petitions. It is elementary though it is to be restated that no one can ask for a mandamus without a legal right. There must be a judicially enforceable right as well as a legally protected right before one suffering a legal grievance can ask for a mandamus. A person can be said to be aggrieved only when a person is denied a legal right by someone who has a legal duty to do something or to abstain from doing something. (*See Halsbury's Laws of England 4th Ed. Vol.I, paragraph 122; State of Haryana v. Subash Chander Marwaha; Jasbhai Motibhai Desai v. Roshan Kumar Haji Bashir Ahmed and Ferris: Extraordinary Legal Remedies, paragraph 198).*

In the case of **Jatinder Kumar and others vs. State of Punjab and**

others, (1985) 1 Supreme Court Cases 122, the Supreme Court has observed as under:-

> "10.We now take up the contentions raised by Mr. Frank Anthony, counsel for the appellants, that they have a right to be appointed to the post of Assistant Sub Inspectors on the basis of the selection made by the Board.
>
> 11.Article 320 of the Constitution enumerates the duties to be performed by the Union or the State Public Service Commissions:
>
> (i) to conduct examinations for appointments to the services of the Union and the services of the State respectively;
>
> (ii) If requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualification are required;
>
> (iii) to advise on matters enumerated under clause (3) of Article 320; and
>
> (iv) to advise on any matters so referred to them and any other matter which the President or as the case may be, the Governor of the State may refer to them.
>
> The fact that there is no provision in the Constitution which makes the acceptance of the

advice tendered by the Commission, when consulted, obligatory renders the provisions of Article 320 (3) only directory and not mandatory.

12.The establishment of an independent body like Public Service Commission is to ensure selection of best available persons for appointment in a post to avoid arbitrariness and nepotism in the matter of appointment. It is constituted by persons of high ability, varied experience and of undisputed integrity and further assisted by experts on the subject. It is true that they are appointed by Government but once they are appointed their independence is secured by various provisions of the constitution. Whenever the Government is required to make an appointment to a higher public office it is required to consult the Public Service Commission. The selection has to be made by theCommission and the Government has to fill up the posts by appointing those selected and recommended by the Commission adhering to the order of merit in the list of candidates sent by the Public Service Commission. The selection by the Commission, however, is only a recommendation of the Commission and the final authority for appointment is the Government. The Government may accept the recommendation or may decline to

accept the same. But if it chooses not to accept the recommendation of the Commission the Constitution enjoins the Government to place on the table of the Legislative Assembly its reasons and report for doing so. Thus, the Government is made answerable to the House for any departure vide Article 323 of the Constitution. This, however, does not clothe the appellants with any such right. They cannot claim as of right that the Government must accept the recommendation of the Commission. If, however, the vacancy is to be filled up, the Government has to make appointment strictly adhering to the order of merit as recommended by the Public Service Commission. It cannot disturb the order of merit according to its own sweet will except for other good reasons viz., bad conduct or character. The Government also cannot appoint a person whose name does not appear in the list. But it is open to the Government to decide how many appointments will be made. The process for selection and selection for the purpose of recruitment against anticipated vacancies does not create a right to be appointed to the post which can be enforced by mandamus. We are supported in our view by the two earlier decisions of this court in *A.N.D`Silva v. Union of*

> *India* and *State of Haryana v. Subash Chander Marwaha.* The contention of Mr. Anthony to the contrary cannot be accepted."

In the case of **Shankarsan Dash vs. Union of India, (1991) 3 SCC 47**, the Supreme Court has observed as under:-

> "7.It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in

> the decisions in State of Haryana v. Subhash Chander Marwaha, Neelima Shangla v. State of Haryana, or Jatendra Kumar v. State of Punjab."

The aforesaid dicta of the Supreme Court makes it abundantly clear that the petitioners do not have an indefeasible legal right much less an enforceable legal right to seek the issuance of a writ in the nature of Mandamus. Mr. Jaspal Singh, learned Sr. Counsel had, however, submitted that the appointments on the posts advertised would have to be made, in view of Section 4 of the 2002 Act. We are of the considered opinion that the aforesaid submission is wholly without substance. The 2002 Act in fact imposes embargo on the appointments beyond the advertised posts. It does not create a legal duty to necessarily make appointments on all the posts advertised. We also do not find much substance in the submission of the learned counsel, on "promissory estoppel". We have our doubts as to whether the principles of "promisorry estoppel" would be applicable against the implementation of the Notification dated 13.5.2005. This view of ours will find support from the judgment of the Supreme Court in the case of **N.Ramanatha Pillai (supra)**. In the aforesaid judgment, the Supreme Court has categorically held as follows:-

> "37.The High Court was correct in holding that no estoppel could arise against the State in regard to abolition of post. The appellant Ramanatha Pillai knew that the post was temporary. In American Jurisprudence 2nd at page 783 paragraph 123, it is stated "Generally, a State is not subject to an estoppel to the same extent as in an individual or a

> private corporation. Otherwise, it might be rendered helpless to assert its powers in government. Therefore, as a general rule the doctrine of estoppel will not be applied against the State in its Government, Public or Sovereign capacity. An exception however arises in the application of estoppel to the State where it is necessary to prevent fraud or manifest injustice". The estoppel alleged by the appellant Ramanatha Pillai was on the ground that he entered into an agreement and thereby changed his position to his detriment. The High Court rightly held that the courts exclude the operation of the doctrine of estoppel, when it is found that the authority against whom estoppel is pleaded has owed a duty to the public against whom the estoppel cannot fairly operate"

Even on facts, the petitioners had been merely invited to appear in the selection process. There was no compulsion involved. There was no deprivation of any other opportunity to apply for any other post during the intervening period. Such an argument has already been emphatically rejected by the Supreme Court. In the case of **Jatinder Kumar and others (supra),** the Supreme has held as under:-

> "16.An argument of desperation was further advanced about promissory estoppel stopping the State Government from acting in the manner it did

> in not appointing the appellants although their names had been recommended. The notification issued by the Board in this case was only an invitation to candidates possessing specified qualifications to apply for selection for recruitment for certain posts. It did not hold out any promise that the selection would be made or if it was made the selected candidates would be appointed. The candidates did not acquire any right merely by applying for selection or for appointment after selection. When the proposal for disbandment of the Punjab Armed Police Battalion and instead creation of additional posts for the district police was turned down by the State Government, the appellants were duly informed of the situation and there was no question of any promissory estoppel against the State."

The aforesaid observations of the Supreme Court make it abundantly clear that the submission made by the learned counsel is rather misconceived. In fact, the learned counsel had also submitted that all the petitioners had applied for recruitment to IAS and other Services. The learned counsel pointed out that 19 petitioners were also candidates for IAS. One actually got selected. Besides, 45 out of the 102 candidates were already working on Class II or Class I post. In our opinion, the aforesaid submission strikes at the very foundation of the submission of the learned counsel with regard to promissory estoppel. It has now become patent that

the petitioners have not changed their position to their detriment. In any event, they are free to participate in any future selection process. Many, in fact, have already participated in the selection process for the next year. It is, therefore, not possible to hold that the petitioners have suffered any loss or damage, much less irreparable loss, by participating in the selection process.

We may now notice the various judgments relied upon by the learned counsels for the petitioners.

Mr. Jaspal Singh, learned Sr. Counsel, relied upon the following observations of the Supreme Court made in the case of **P.Mahendran (supra)**:-

> **"11.**.....In this background, the court made observations that a candidate merely by making applications does not acquire any right to the post. It is true that a candidate does not get any right to the post by merely making an application for the same, but a right is created in his favour for being considered for the post in accordance with the terms and conditions of the advertisement and the existing recruitment rules. If a candidate applies for a post in response to advertisement issued by Public Service Commission in accordance with recruitment Rules he acquires right to be considered for selection in accordance with the then existing Rules. This right cannot be affected by amendment of any rule unless the amending

> rule is retrospective in nature. In the instant case, the Commission had acted in accordance with the then existing rules and there is no dispute that the appellants were eligible for appointment, their selection was not in violation of the recruitment Rules. The Tribunal in our opinion was in error in setting aside the select list prepared by the Commission."

We are of the opinion that the aforesaid observations do not support the claim of the petitioners in any manner. The Supreme Court has clearly held that a candidate merely by making application does not acquire any right to the post. He merely acquires the right to be considered for selection, in accordance with the then existing rules. In our opinion, Notification dated 13.5.2005 has not brought about any amendment in the relevant rules. Therefore, the question of taking away any vested right of the petitioners does not arise.

Thereafter, Mr. Jaspal Singh relied on the following observations of the Supreme Court made in the case of **N.T.Devin Katti (supra) :-**

> "11. There is yet another aspect of the question. Where advertisement is issued inviting applications for direct recruitment to a category of posts, and the advertisement expressly states that selection shall be made in accordance with the existing rules or government orders, and if it further indicates the extent of reservations in favour of various categories, the selection of candidates in such a case must be made in accordance with the then

> existing rules and government orders. Candidates who apply, and undergo written or viva voce test acquire vested right for being considered for selection in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention. Generally, a candidate has right to be considered in accordance with the terms and conditions set out in the advertisement as his right crystallises on the date of publication of advertisement, however, he has no absolute right in the matter....."

In our opinion, in the facts and circumstances of the present case, these observations would also be of no assistance to the petitioners. As observed earlier there is no amendment in any of the relevant rules. A perusal of the observations of the Supreme Court reproduced above shows that the selection of the candidates has to be made in accordance with the existing rules. These observations have been made in the context of reservation of vacancies. It has been clearly held that the candidates who undergo written or viva voce test acquire vested right for being considered for selection in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention. The advertisement dated 24.1.2004 clearly provided in Note (i) that " number of posts given against each category is liable to variation to any extent either way". This Clause would clearly indicate that no candidate can claim any vested right to be selected on any particular number of posts. The Clause permits the variation in the posts to any extent either way. It is the categoric submission of learned Sr. Counsel that all the petitioners had

relied on the terms and conditions contained in the advertisement in support of the submissions based on promissory estoppel. The petitioners cannot be permitted to rely on select parts of the advertisement, in support of their claim. If they have a right to be considered for selection, in accordance with the terms and conditions set out in the advertisement, as their right crystalizes on the publication of the advertisement, a liability also crystalized on the date of the publication of the advertisement to be not selected for want of vacancies. This, in our opinion, would be the natural meaning to be given to the Clause contained in Note (i) providing that number of posts given against each category is liable to variation to any extent either way. The word "extent" has been defined in the Indian Edition of 1981 Edition of Webster's New Collegiate Dictionary, published in 1983, as follows:-

> "**Extent:**
>
> 1. XXX XXX XXX XXX
> 2. XXX XXX XXX XXX
> **3. a:** the range over which something extends: scope <the extent of his authority> **b**: the point, degree, or limit to which something extends <using talents to the greast extent. **C:** the amount of space or surface that something occupies or the distance over which it extends: Magnitude (the extent of the forest)."

The aforesaid definition clearly establishes that the petitioners cannot claim any legal right to be appointed on a fixed number of posts. This, in our opinion, has been clearly held by the Supreme court in paragraph 11 of the judgment rendered in the case of **N.T.Devin Katti (supra)** wherein

the extent of reservation has been fixed for the selection that was under consideration as on 6.9.1969.

Mr. Jaspal Singh, learned Sr. Counsel then relied on a short order passed by the Supreme Court in the case of **Bhim Singh (supra)**, in support of his submission on promissory estoppel. The judgment is as follows:-

> "1.Leave granted.
>
> 2.Having heard the counsel on both sides, we dispose of this appeal as it involves only a solitary point of law already covered by a decision of this Court.
>
> 3.By virtue of Ex.P1, the State (respondent) held out certain specific promises as an inducement for the appellants to move into a New Department (Agriculture Department). After they had gone over to the Agriculture Department, the State, by virtue of its Ex.P3, sought to go back upon the earlier promise made in Ex.P1. The appellants having believed the representation made by the State and having further acted thereon cannot now be defeated of their hopes which have crystalised into rights, thanks to the application of the doctrine of promissory estoppel. Therefore, it is not open to the State, according to the law laid down by this Court, to backtrack. We, therefore, direct the State to implement Ex.P-1 and confer such rights and benefits as are promised thereunder in entirety.

> Shri B. Datta says that a little time may be necessary for the various departments to readjust. We allow three months' time for implementation of Ex.P-1, failing which the State will be held in breach. No costs."

It appears from the aforesaid observations that the respondent-State had created a new department. Some employees of the respondent-State had been persuaded to join the new department, by making certain promises of additional benefits. After the employees joined the new department, the benefits were sought to be withdrawn. In such circumstances, a direction was issued to the State to confer such rights and benefits which had been earlier promised to the employees. In the present case, no promises were held out to the petitioners. Advertisement clearly stated that the number of posts is subject to variation to any extent.

Mr. Jaspal Singh had then relied on a Division Bench judgment of the Delhi High Court in the case of **Kanishka Aggarwal (supra).** The judgment was delivered by Jaspal Singh, J. The Division Bench, in this case, was considering the rights of students to continue in the LLB course to which they had been admitted. It was, however, claimed by the University that the students had been irregularly granted provisional admission. Therefore, their admissions were not confirmed. The High Court had permitted the petitioners to join the classes and to sit for the Ist Semester examination. This order was passed on 13.12.1990. The judgment was delivered on 11.3.1991. Mr. Shanti Bhushan, learned counsel appearing for the petitioner therein had sought the relief on four grounds i.e. (i) breach of Articles 14 and 15 of the Constitution of India; (ii)the petitioners were not

informed about the rule of the Admission committee; (iii) the university was estopped from taking any action against the petitioner; (iv) since the petitioner had not suppressed any information and he had submitted the requisite admission form; he had deposited the admission fee; had been allowed to join class, it was not open to the University now to undo what had already been done. Considering the plea of 'Promissory estoppel",speaking for the Bench, Jaspal Singh, J. observed as follows:-

> "30.We feel, with respect, that Mr. Rao was seeking, in effect, to re-enact the later half of the nineteenth century which had seen equitable estoppel being devasted first by the House of Lords in Jordan v. Money (1854) 10 ER 868 limiting estoppel by representation to representation of existing fact and then by Fry J. in Willmott v. Barbet (1880) 15 Ch D 90 which laid down a series of probanda (We got the impression, we wish wrongly, as if Mr. Rao was championing the probanda) and by Bown LJ in Low v. Bouverie (1891) 3 Ch 82 Mercifully only Ramsden v. Dyson (1866) LR 1 HL 129 could escape the ravages of the nineteenth century, though it could not escape being bruised badly. It had broadly covered the area of estoppel by acquiescence. It was bruised as it had become subject to the qualifications of the probanda of Fry J. in Willmott and to being limited to being a rule of evidence. It was left to the

middle years of this century to break the shackles applied to the Ramsden v. Dyson (1866-LR 1 HL 129) principle by transforming it into what we now call "proprietary estoppel". It is not limited by the probanda of Fry J. (See: Shaw v. Applegate (1977) 1 WLR 970; Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd. (1982) 1 QB 133: Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank (1982) 1 QB 84); it can operate as a cause of action, (See: Amalgamated Investment, (ibid) it is of general applicability (See Moorgate Mercantitle v. Twitchings ((1976) QB 225; Western Fish Products Ltd. v. Penwith District Council (1981) 2 All ER 204, 208; Habib Bank Ltd. v. Habib Bank AG Zurich (1981) 1 WLR 1265, 1282), and above all it is not subject to categorisation (See Crabb v. Arun District Council (1975-3 All ER 865). It has been hailed as "one general principle shorn of limitation" (per Lord Denning in Amalgamated Investment supra) and as a most "general", "flexible" and "useful principle" (ibid). We may, at this stage, also refer to that great Judge coming from Australia- Dixon J., and to his two judgments Thompson v. Palmer and Grundt v. Great Builders Pty. Gold Mines Ltd. (1937) 59 CLR 641. What is

significant for our purposes is that in the later judgment Dixon J. took as the starting point for his estoppel in paes, the "assumption" made by the party seeking to set up the estoppel, rather than the conduct of the party sought to be estopped. The forms of "conduct giving rise to an estoppel" to which Dixon J. referred to in Thompson v. Palmer (supra) may be summarised as "estoppel by convention", "estoppel by exercise of rights", "estoppel by acquiescence in another's mistake", "estoppel by negligence" and "estoppel by representation". The notion of the making of a promise has no place in any of these.

31.Although Mr. Rao wanted us to place very heavy onus on the petitioner and although, according to him, the conduct on the part of the University must be shown to have been clear, unambiguous and pronounced (the same being, according to him, central to the plea) to satisfy the requirement of estoppel and although he also wanted us to believe that the representation must be express and unerringly leading to the act of the petitioner, the legal position now appears to be as follows: (i) The onus placed on the party raising the plea of estoppel is very light, (ii) There need be no express representation; (iii) Form of

> representation is not material. The effect is. A mere raising of an expectation would suffice (iv) Acquiescence or standing by would be sufficient (per Lord Kingsdom in Ramsden (1866 LR 1 HL 129), supra); (v) A very minimum of conduct is normally required."

Even applying the aforesaid principle, we are unable to hold that the petitioners in this case can be granted any relief in the facts and circumstances of the present case. As noticed earlier, the advertisement dated 24.1.2004 clearly indicates that the number of posts to be filled is subject to variation to any extent. The definition of the term "variation" as contained in the Oxford English Dictionary (supra) indicates that it denotes the characteristic of change ability rather than fixity or rigidity. The actual term in the Note under consideration is that posts are variable to any extent. The definition of the term "extent" as contained in the Webster's New Collegiate Dictionary (supra) clearly shows that the term "extent" can denote limit. Thus, the term "any extent" would permit variation in a number of posts to any limit. In the present case, the cadre strength has been fixed at 230 as opposed to 300 posts claimed by the petitioners. Therefore, it can hardly be said to be even a variation to a substantial extent or a great extent. This apart, the petitioners have not suffered any irreparable loss. In the present case, the claim of promissory estoppel would be against the law laid down by the Supreme in the case of **Jatinder Kumar (supra).** We may also notice that this argument on promissory estoppel has been raised by the learned counsel for the petitioners only at the stage of arguments. The plea of "Promissory estoppel" would be a mixed question of law and fact. It

would, therefore, have to be properly pleaded and proved. In our opinion, no plea of "promissory estoppel" can be allowed to be raised, unless it is pleaded and the factual foundation for it is laid in the pleadings. This view of ours will find support from the observations of the Supreme Court in the case of **M/s Motilal Padampat Sugar Mills Co. Ltd. (supra)** wherein it has been held as follows:-

> **"5.** .....It is elementary that waiver is a question of fact and it must be properly pleaded and proved. No plea of waiver can be allowed to be raised unless it is pleaded and the factual foundation for it is laid in the pleadings."

The Division Bench in **Kanishka Aggarwal's case (supra)** was considering the claim of the students, whose entire future as Law students had been put in jeopardy by the University when it declined to confirm the provisional admission which had been granted to them. A loss of one year of study would certainly have caused irreparable loss to the students. They were not in any manner to be blamed. Hence the Division Bench came to their rescue and permitted them to continue in the course. In the present case, no relief can be granted to the petitioners on the principle of "promissory estoppel"

Before we consider the judgments cited by Mr. Chatrath, learned Sr. Counsel, we may notice that at the commencement of the arguments, in his usual flamboyant style, he had submitted that "not to appoint selected candidates of previous Government is a normal practice in Haryana".We would not be able to take judicial notice of such a broad and sweeping statement.

We may now consider the judgments relied upon by Mr. G.K.Chatrath, Sr.Advocate. In the case of **State of Uttar Pradesh v. Singhara Singh (supra),** the Supreme Court has held that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that the other methods of performance are necessarily forbidden. In the cases of **Hukum Chand Shyam Lal (supra)** and **Chandra Kishore Jha (supra),** the law laid down in the case of **Singhara Singh (supra)** has been reiterated. The case of **M.S.Ahlawat (supra)** pertains to the interpretation of the provisions of Sections 195 and 340 Cr.P.C. It has been held that the procedure prescribed therein for taking cognizance of any of the offences mentioned therein is mandatory in nature. In the earlier part of the judgment, we have held that the respondents have complied with the statutory provisions before issuing the Notification dated 13.5.2005. Therefore, the rule laid down in these judgments has not been infringed. In the case of **Raj Kumari (supra),** all formalities for appointment had been completed before the ban on appointment was imposed by the State of Punjab. The appointment order had already been issued. The petitioner was not permitted to join, inspite of the fact that she belonged to the Scheduled Caste Category. Therefore, in the peculiar facts and circumstances of the case, the Division Bench of this Court, of which one of us (S.S.Nijjar,J.) was a member, directed the respondents to permit the petitioner to join. The aforesaid judgment is of no avail to the petitioners. We are also of the opinion that the submissions with regard to the pendency of the vigilance enquiry or otherwise, are of no consequence. The petitioners have not been denied appointments on the ground that their selection was found to be tainted. The respondents have shown their

inability to issue appointment order for want of vacancies. Therefore, the observation of the Supreme Court in the case of **Inderpreet Singh Kahlon and others v. State of Punjab and others (supra)** would be of no assistance to the petitioners in the present case. Therein the appointments had been made to Punjab Civil Services (Judicial Branch) as well as Punjab Civil Services (Executive Branch). The Officers had worked for quite some time. However, due to the wide scale allegations of nepotism and corruption against the Chairman of the Punjab Public Service Commission, the appointments had been cancelled, on the basis of the fact finding enquiry of two sub-committees of this Court, which had been accepted by the Full Court. It was held that the services of the petitioners had been terminated in violation of the principles of natural justice and Article 311 of the Constitution of India. As noticed earlier, the petitioners therein had been working for a number of years. Some of them had even cleared the period of probation. In our opinion, the observations made by the Supreme Court in the context of aforesaid facts would not be applicable to the facts and circumstances of this case. In **Inderpreet Singh Kahlon's** case, the Supreme Court has clearly held as follows:-

> "54.It is now well-settled that a decision is an authority for what it decides and not what can logically be deduced therefrom. It is also well settled that a ratio of case must be understood having regard to the fact situation obtaining therein. (See **P.S.Sathappan (Dead)** By L.Rs. v. Andhra Bank Ltd. and others, M.P. Gopalakrishnan Nair v. State of Kerala and Haryana State Coop. Land Development Bank v. Neelam.)."

These observations of the Supreme Court clearly lay down that the ratio of the judgment must be understood having regard to the fact situation obtaining therein. The facts of the present case are wholly distinguishable from the facts which were under the consideration of the Supreme Court in the case of **Inderpreet Singh Kahlon and Ors. v. State of Punjab and others**. In the present case, the petitioners have been denied the appointment for want of vacancies. The pendency of the Vigilance Enquiry is only given as an additional justification for the decision taken.

We also do not find much substance in the submissions made by Mr.Rajiv Atma Ram, Sr. Advocate. The learned counsel submits that under Clause 7 (vi) (d) of the Model Code, the ban on appointments is restricted only to the ad hoc appointments. There can be no ban on regular appointments, pursuant to the valid selections made by the HPSC. In our opinion, the submissions of the learned counsel run counter, to the view taken by a Division Bench in the case of **Harbans Singh Jalal, Ex. MLA, Bathinda** (supra). In this case, it has been categorically held that the Election Commission was entitled to take necessary steps for the conduct of a free and fair election. We may reproduce the relevant observations of the Division as under:-

> "24.In view of what has been stated above, we are clear in our mind that the Election Commission is entitled to take necessary steps for the conduct of a free and fair election even anterior to the date of issuance of Notification, from the date of announcement of the election. While doing so, the model code of conduct adopted to be followed by

> all political parties including the political party in Government, can be directed to be followed by the Election Commission. Action of the Commission in this regard cannot be faulted, for the said model code of conduct adopted by the political parties does not go against any of the statutory provisions. It only ensures the conduct of a free and fair election which should be pure."

From the above extract, it becomes evident that the Election Commission was within its jurisdiction to issue all necessary instructions for the free and fair conduct of the election. We may also notice that the letters dated 23.12.2004 and 27.12.2004 were in any event wholly ineffective, after the election process was over. It is a matter of record that counting of the votes was to take place on 27.2.2005. After the Assembly Elections, the present Government came into power. Even otherwise, the only directions issued in the letters dated 23.12.2004 and 27.12.2004 was not to make appointments, without the permission of the Election Commission so long as the Model Code of Conduct is in operation. Therefore, the aforesaid letters dated 23.12.2004 and 27.12.2004 did not place a complete embargo on the power of the competent authority to make appointments. Even if the aforesaid two letters were to be ignored, still no relief could be granted to the petitioners, for want of vacancies.

We may now consider the judgments relied upon by Mr. Rajiv Atma Ram, Sr.Advocate. In the case of **Babita Gupta (supra)**, the petitioner had been issued the appointment as well as the posting order. Therefore, the DPI (Schools), Punjab was directed to issue written instructions to all the

District Education Officers and other competent authorities to allow the selected and duly appointed teachers to join their duty forthwith. In the present case, neither any vacancy exists nor any appointment order has been issued. Therefore, the judgment rendered in the case of **Babita Gupta (supra)** is of no assistance to the petitioners. In the case of **I.J.Divakar (supra),** a post within the purview of State Public Service Commission was advertised. The appellants therein had applied for the post. However, before the select list could be finalised, the post was withdrawn from the purview of the Commission. The Government regularised the services of all temporary Government servants who had been appointed by direct recruitment to any category of post, including the posts advertised. The Supreme Court held that inviting application for post does not by itself create any right to the post for the candidate who, in response to the advertisement, makes an application. It was further held that the appellants had no right to challenge the Government order withdrawing the advertised posts from the purview of the Commission. However, the Court, in order to do justice between the parties, directed the Commission to finalise the select list on the basis of the viva voce test conducted and mark assigned and forward the same to the Government. It was further directed that if the appellants or any of them fall within the zone of selection, they must be first appointed according to their place in the select list before any outsider is appointed to the post. These observations are of no assistance to the petitioners, as in the present case, neither any vacancy exists, nor any other individuals have been appointed on the posts that had been advertised. Rather in this case, the Supreme Court has reiterated the settled law that a person on the select panel has no vested right to be appointed to the post for

which he has been selected. He has a right to be considered for appointment, but at the same time, the appointing authority cannot ignore the select panel or decline to make the appointment on its whims. It has also been observed that when a person has been selected by the Selection Board and there is a vacancy which can be offered to him, keeping in view his merit position, then ordinarily, there is no justification to ignore him for appointment. There has to be justifiable reason to decline to appoint a person who is on the select panel. On the facts of that case, the Supreme Court had come to the conclusion that there has been a mere inaction on the part of the Government. No reason whatsoever was given as to why the appointments were not offered to a candidate expeditiously and in accordance with law. These observations would not be applicable in the facts and circumstances of the present case. The Government has taken a conscious decision not to make appointments as there are no vacancies on which the petitioners can be appointed. Therefore, there is no question of following any select list. In the case of **Raghava Rajgopalachari (supra)** the Supreme Court laid down the salutary principle that respondents to a writ petition cannot be allowed to attack its own order as a respondent. This principle is not applicable in the facts and circumstances of the present case. The respondents are not attacking any earlier orders passed by the respondents. They have merely stated that some promotees are occupying the posts meant for direct recruits and that the promotees are in excess of the quota. In the case of **Joginder Pal Singh (supra)**, a Single judge of the Delhi High Court has followed the rule of law laid down by the Supreme Court in the case of **Raghava Rajgopalachari (supra).** In the case of **Punjab Tourism Development Corporation (supra),** the management had challenged the

award passed by the Labour Court whereby workmen had been reinstated in service. The Labour Court had exercised its power under Section 11-A of the Industrial Disputes Act. This Court held that the award of the Labour Court had been passed in accordance with law. It was held that the Labour Court had the jurisdiction to interfere with the punishment awarded by the employer in appropriate cases. It was held that the Labour Court is under a duty to examine the issue of punishment awarded by the employer and decide for itself whether the punishment is justified or not. It was further held that in case where the Tribunal or the Labour Court comes to a conclusion that the punishment is unduly harsh or highly disproportionate to the misconduct found proved, the Labour Court/Tribunal can interfere with the award of punishment. The Division Bench also reiterated the well-settled principle that while exercising certiorari jurisdiction under Articles 226/227 of the Constitution of India, this Court can interfere with the award of Labour Court only if it is shown to be, without jurisdiction or contrary to the principle of natural justice or it is established that the impugned award suffers from an error of law apparent on the face of it. We fail to see how these observations are of any assistance to the petitioners, in the present case. In the case of **Sukhdev Singh Sidhu (supra)**, a Full Bench of this Court was, inter alia, considering the impact of interim order issued by the CAT on the selection process to the Indian Administrative Service. It was held that the Tribunal is required to consider not only the interest of the parties, but also the larger interest of service as also the element of public interest before any interim orders are issued restraining the State from making promotions to the IAS. These observations, in our opinion, are of no assistance to the petitioners. In the case of **Girish Arora (supra),** the

Division Bench has reiterated the law laid down in the case of **Shankarsan Dash (supra)** that the government cannot decline to make appointments arbitrarily. It has already been held by us that the action of the respondents is neither unfair nor arbitrary.

The judgments cited by Mr. R.K.Malik may be noticed. In the case of **Prem Chander, Naib Tehsildar (supra)**, a Division Bench of this Court held that the power of the executive to abolish a post has been well recognised, but it must always be exercised in good faith and in public interest and never arbitrarily. A formal order of abolition of a post is not decisive of the question whether the post has factually been abolished. These observations are of no assistance to the petitioners as upon examination of the record, this Court has come to the conclusion that the Notification dated 13.5.2005 does not suffer from any arbitrariness.

We may now consider the submission of Mr. Patwalia, learned Sr. Advocate about the political speeches and the newspaper reports. We are unable to accept the submission also. It is a settled proposition of law that no judicial notice can be taken of newspaper reports. The claims made by politicians or political parties during the period of campaign would fall in the same category. We draw support for our aforesaid opinion from the following observations of the Supreme in the case of **Laxmi Raj Shetty and another vs. State of Tamil Nadu AIR 1988 S.C. 1274:-**

> **"25.**..... We cannot take judicial notice of the facts stated in a news item being in the nature of hearsay secondary evidence, unless proved by evidence aliunde. A report in a newspaper is only hearsay evidence. A newspaper is not one of the documents

referred to in S. 78(2) of the Evidence Act, 1872 by which an allegation of fact can be proved. The presumption of genuineness attached under S. 81 of the Evidence Act to a newspaper report cannot be treated as proof of the facts reported therein.

26.It is now well-stated that a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in court and deposing to have perceived the fact reported.....

The question as to the admissibility of newspaper reports has been dealt with by this Court in Samanty N. Balakrishna v. George Fernandez, (1969) 3 SCR 603: (AIR 1969 SC 1201). There the question arose whether Shri George Fernandeze, the successful candidate returned to Parliament from the Bombay South Parliamentary Constituency had delivered a speech at Shivaji Park attributed to him as reported in the Maratha, a widely circulated Marathi newspaper in Bombay, and it was said:

“A newspaper report without any further proof of what had actually happened through witnesses is of no value. It is at best a second-hand secondary evidence. It is well known that reporters collect

> information and pass it on to the editor who edits the news item and then publishes it. In this process, the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible."

The law laid down in the aforesaid judgment has been reiterated by the Supreme Court in the case of **State of Haryana and others vs. Chaudhary Bhajan Lal and another AIR 1993 SC 1348** wherein It has been observed as under:-

> "22.In the present case, no evidence has been led in proof of the statement of facts contained in the newspaper report. The absence of any denial by Ch. Bhajan Lal will not absolve the applicant from discharging his obligation of proving the statement of facts as appeared in the Press report....."

We are of the considered opinion that the aforesaid observations of the Supreme Court completely answer the submissions made by Mr. P.S.Patwalia, learned Sr. Advocate. We may also notice that in the present case, apart from the bald assertions, no material has been placed on the record in proof of the truth of the assertions made. It would, therefore, be not possible for this Court to accept the submissions made on the basis of the newspaper reports.

The judgments relied upon by Mr. Mehtani may also be noticed. In the case of **Jaskaran Singh Brar (supra),** a Full Bench of this Court considered the scope for entertaining writ petition filed as a public interest

litigation challenging the selections made on the post of Deputy Superintendent of Police from outstanding sports persons. It was held that such writ petitions would be maintainable. In the case of **Girish Arora (supra),** the principles of law have been enumerated in paragraph 36 of the judgment. The conclusion no. 36 (b) lays down that in case where the appointing authority does not accept the recommendations of the selecting agency, it is bound to record the reasons for its decision and place the same before the Court as and when called upon to do so. In the present case, the respondents have clearly complied with the aforesaid principle.

It would not be necessary to consider any of the other judgments cited by the learned Advocate General, Haryana as these judgments merely reiterate the settled principles of law which we have noticed in different parts of the judgment.

On consideration of the entire material, we are unable to hold that the action of the respondents is unfair. Mr. Jaspal Singh, learned Sr. Counsel has concluded his submission by making a reference to a judgment of the English Court of Appeal rendered in the case of **Jennison v Baker, All England Law Reports (1972) 1, page 996.** He has placed particular reliance on the following observations of Lord Edmund Devies LJ:-

> "....The one question that now arises is whether the county court judge was empowered to commit the defendant, so that, in the memorable words of his Honour Judge Curtis-Raleigh:
>
> "The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope."

On the basis of the aforesaid observations, he submitted that this Court should issue a writ in the nature of Mandamus directing the respondents to give the appointments to the selected candidates. We entirely agree with the sentiment expressed in aforesaid extract. We will indeed apply it in an appropriate case. In the facts and circumstances of this case, it would perhaps not be applicable. We, therefore, do not accept the submission of Mr.Jaspal Singh.

In view of the above, we do not find any merit in these writ petitions and the same are dismissed. No costs.

(S.S.NIJJAR)
ACTING CHIEF JUSTICE

(S.S.SARON)
JUDGE

12.10.2006
MFK
NOTE: Whether to be referred to Reporter or not:YES/NO